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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 571

GARY JAMES SYLVIA, *Petitioner*

v.

THE STATE OF FLORIDA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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Petitioner prays that a writ of certiorari issue to review the opinion of the District Court of Appeal of Florida, Third District filed May 7, 1968, and the Order Denying Rehearing filed May 29, 1968.

OPINIONS BELOW

The Judgment of the Criminal Court of Record in and for Dade County, Florida, was filed and entered on May 4, 1967. (App. D) It is recorded in Criminal Court of Record Minute Book No. 243 at Page 354.

The Opinion of the District Court of Appeal of Florida, Third District, was filed May 7, 1968. (App. H) It is recorded in Minute Book 26 at Page 106. Rehearing was denied on May 29, 1968. Denial of rehearing is recorded at Minute Book 26, page 214. (App. J) The opinion of the District Court of Appeal of Florida, Third District, is reported at 210 So.2d 286 (Fla App. 1968).

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, entered on May 7, 1968, became final upon denial of Petition for Rehearing on May 29, 1968. Mr. Justice Black extended the time for filing Petition for Writ of Certiorari to and including September 26, 1968). (App. K)

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

Does the Defense of Entrapment Relied Upon by One Defendant in a Joint Trial for Robbery Inculpate His Co-Defendant So as To Require Reversal under Bruton v. United States, When Motions for Severance Were Denied and Objection Was Made to the Introduction of the Entrapment Witnesses by His Co-Defendant?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES—AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES—AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE—SECTION 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES RULE 19

(1)(a) Where a state court had decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

STATEMENT OF THE CASE

GARY JAMES SYLVIA and FRANK HIRAM BEAUCHAMP were jointly tried upon the charge of breaking and entering a dwelling house with intent to commit a robbery. (App. A) Defendant, SYLVIA, was charged as a principal in the first degree, with aiding, abetting and otherwise procuring Defendant, BEAUCHAMP, to break and enter the dwelling house with the intent to commit a robbery, by Defendant SYLVIA, waiting outside in a parked car for the purpose of assisting Defendant, BEAUCHAMP to escape. Defendant, SYLVIA, entered a plea of not guilty. A joint jury trial was held.

Defendant, SYLVIA, made numerous motions for severance before and during the trial, all of which were denied by the Court. He contended that he would be prejudiced by Defendant, BEAUCHAMP's reliance on the defense of entrapment, a defense which was antagonistic to his own defense. Defendant SYLVIA pre-

sented no evidence. He contended that Defendant BEAUCHAMP's reliance on the defense of entrapment, and testimony presented by Defendant BEAUCHAMP in support of that constituted an admission of the facts of the crime causing prejudice to Defendant, SYLVIA.

The evidence disclosed that Julius Deitch (an undercover agent for the Wackenhut Corporation) had discussed the robbery prior to the date of its commission. Deitch was introduced to Defendant SYLVIA at the home of Doreen Greer. Prior to that time Deitch had met with Defendant BEAUCHAMP. Defendant SYLVIA was present at a subsequent meeting between Deitch and BEAUCHAMP as well as on one occasion when the three men drove past the location of the dwelling house which was the subject of the crime charged. On each of the occasions when SYLVIA was present although BEAUCHAMP and Deitch discussed plans, SYLVIA did not participate in the discussion.

SYLVIA was present at a discussion in BEAUCHAMP's apartment when BEAUCHAMP laid out the plans of the house with toothpicks. SYLVIA asked Deitch if a piece was needed, referring to a gun, but no decision to use a gun was made. SYLVIA drove Deitch's car from a restaurant to a location near the house. BEAUCHAMP sat in back and Deitch sat in front.

No other testimony was presented as to Defendant SYLVIA.

Almost one-half the trial testimony concerned the activities of Defendant Beauchamp. According to testimony presented at the trial, Deitch and BEAU-

CHAMP went to the residence. SYLVIA remained behind, in the parked car a block away.

Testimony was admitted indicating that BEAUCHAMP and Deitch donned stocking masks, opened the screen door and the front door and heard the shout "Freeze, or you're dead", by police, who caused BEAUCHAMP to place his mask and unloaded gun on a chair and lie down on the floor. Several officers, armed with shotguns, and the family who resided at the house, had been waiting in the darkened house. Evidence, including wire, gloves, a bag, stockings and a gun was introduced over objection of counsel for Defendant SYLVIA at the trial.

Defendant SYLVIA was found guilty by the jury. The trial court denied numerous repeated motions for severance and mistrial. On several occasions the court cautioned the jury to limit the testimony to Defendant BEAUCHAMP. On several other occasions however, the court declined to give the requested instruction. Defendant BEAUCHAMP offered witnesses to testify in his behalf in order to prove his defense of entrapment.

BEAUCHAMP was sentenced to thirty years. Defendant SYLVIA was sentenced to imprisonment for eight years. He is presently incarcerated.

The trial court erroneously adjudicated Defendant SYLVIA convicted of "unlawfully and feloniously breaking and entering a dwelling house with intent to commit a felony; to-wit, grand larceny." The District Court of Appeal of Florida, Third District, reversed this portion of the trial court's adjudication so that it might conform with the charge of committing the felony of robbery.

HOW THE FEDERAL QUESTION WAS RAISED

Prior to trial, Motion for Severance on the ground that Defendant, SYLVIA would be unable to call Defendant BEAUCHAMP as a witness was made (T-27). The Motion was denied (T-28).

Motion for Severance was renewed (T-33) on the ground that discovery information afforded Defendant BEAUCHAMP was not presented to Defendant SYLVIA. The Motion was denied.

Antagonistic defense was the ground for the renewal of the Motion for Severance (T-38). It was denied.

At the trial Motions for Severance were made on numerous occasions. These Motions are too numerous to include here. The Court denied all Motions for Severance.

The Court relied on *Delli Paoli* v. *United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 in denying Motion for Severance (T-224) based on Defendant BEAUCHAMP's proposed calling of witnesses when Defendant SYLVIA would present no evidence. Transcript of Testimony, Page 226

> Mr. Grusmark: ". . . I can call Frank Beauchamp to the stand in another case. If this case were being tried one right after the other, I could call him tomorrow morning to the stand and when he doesn't testify, I can scream about it to the jury—and I can scream—but I could comment on it to the jury.
>
> Now, in this case I cannot call him to the stand. I cannot comment on it to the jury because a mistrial must result. That is the law.
>
> Now, in this case I cannot call him to the stand. I cannot comment on it to the jury because a mistrial must result. That is the law. . . .

I cannot be bound by the two witnesses that he produced. Here in fact the Court knows already that the positions are antagonistic. This has not created error. This is inherent in the very nature of this lawsuit.

Now it is true that many times you try a case and you get involved in the problem, you are away into the case and you try to cure it by instructions.

But not when you know in advance that it must take place, and here we know in advance that this must take place.

Transcript of Testimony, Page 228

The Court: "Would you recite again for me, and make it crystal clear, Mr. Grusmark, what your theory is as to why you must call Beauchamp as a defense witness on behalf of Sylvia?

What is the reason for that?

Mr. Grusmark: Because Beauchamp is going to testify that this is a deal that was all set up in advance, if there is such a deal between him and Deitch, and that this kid came along later and they said, "Get in the car and drive us away."

He had nothing to do with it. They had been talking about it as Deitch said since February 28th.

Deitch said, "I talked to him every day." Then he said, "I spoke to him again on March 5th."

Then he said the question of the gun—the question of the gun is important. Deitch says there were no guns in the car. The police say that the guns were first seen inside the house.

Deitch said Sylvia didn't know whether there was a gun. All of this evidence comes in inside the house, not in the car, not in the discussions with Sylvia at all.

I can prove this with him. I am entitled to prove it with him. I am not going to be tarred with these two witnesses. It just isn't right.

Transcript of Testimony, Page 332

Mr. Grusmark: "We object to any testimony after we have rested since we are entitled to have this case tried as if we were being tried alone, and our rights can be jeopardized by any further testimony concerning this situation.

The Court: Overruled.

This witness is being called on behalf of the defendant Frank Hiram Beauchamp."

Transcript of Testimony, Page 336

Mr. Grusmark: ". . . If it would create a more fair situation for everybody, we request the case go to the jury now on behalf of the defendant Sylvia."

Transcript of Testimony, Page 337

Mr. Grusmark: We have rested. If a severance had been granted we would be going to the jury now.

We feel honestly, and I know the Court by now is convinced that I am totally honest in my position, we feel honestly that these people must prejudice us and that he cannot get a fair trial after they take the stand and when they sit in the stand and are seen by the jury.

We ask that we be given the right to argue the case and have it go to the jury now with the right to argue a motion for new trial or a directed verdict at the end of all the testimony.

The Court: The request is denied."

Transcript of Testimony, Page 338

Mr. Grusmark: "If I ask questions can it be with the specific understanding that it is without waiving my objection to the appearance of the witnesses and without waiving my request for a

severance and for a separate consideration by the jury.

The Court: No.

Mr. Grusmark: I don't know what the "No" means. Is it without waiving that position?

The Court: You will have to take your chances in questioning the witness, Mr. Grusmark."

Motion for Severance was filed by counsel for Defendant SYLVIA (R-542) (Appendix B)

"1. That if the defendants herein were to be tried jointly, defendant, Gary James Sylvia, could be frustrated in his right to call the co-defendant as a witness because of the co-defendant's privilege against self-incrimination and if said co-defendant exercised such right, this defendant would be frustrated and embarrassed in his defense of this matter."

The Motion was denied (R-548).

The federal question was raised in the Motion for New Trial (R-566) (App. E)

"3. The Court erred in failing to grant a severance as to GARY JAMES SYLVIA in that the failure to grant said severance prejudiced his right to fair trial.

4. The Court erred under the requirements of *Jencks* v. *United States,* 353 U.S. 657, 1 L.Ed.2d 1103, in failing to require the State to produce statements of the prosecuting witness for the purpose of aiding counsel in cross-examining that witness.

6. The defendant, Gary James Sylvia's constitutional rights and protection were not fully protected in that comment was made on evidence to be produced and produced on behalf of the de-

fendant, Frank Hiram Beauchamp, which would necessarily raise a question in the minds of the jurors as to the failure of the defendant, Gary James Sylvia, to present testimony in his behalf. No instructions of the Court could erase any such query raised in the minds of any juror. See *Deluna* v. *United States*, 308 Fed 2d 140.

7. Defendant, Gary James Sylvia, if granted a severance and a new trial, would call to the stand the co-defendant, Frank Hiram Beauchamp, to establish the innocence of the defendant, Gary James Sylvia. Prior to the verdict of the jury and the sentence imposed by the Court the antagonism between the two defendants reflected repeatedly in the record, made it impossible for counsel for defendant, Gary James Sylvia, to secure information subsequently received, which could only come from testimony of the co-defendant, Frank Hiram Beauchamp. That testimony could not have been introduced at the trial of the defendants tried jointly under the restrictive constitutional requirements elucidated in DeLuna."

The Assignment of Errors raised the federal question (R-572) (Appendix G)

"7. That the Court erred in denying this defendant's motion for severance by its order dated April 17, 1967, in violation of defendant's constitutional rights pursuant to the applicable provisions of the Florida Constitution and the 6th and 14th Amendments to the United States Constitution.

8. That the Court erred in denying this defendant's motions for severance repeatedly renewed during the course of the trial in this cause in violations of this defendant's constitutional guarantees under the applicable provisions of the United States and Florida Constitutions.

13. That the Court erred in denying this defendant's motion to produce statements of Julius Deitch

made to the prosecuting authorities, said Julius Deitch being a police officer or agent, in violation of this defendant's constitutional guarantees under the United States Constitution."

The federal question was raised in the Brief and Reply Brief of Sylvia.

The District Court of Appeal, Third District, held that the trial judge did not abuse his discretion in refusing to grant the Motion for Severance, thus holding in effect that Defendant SYLVIA's constitutional rights had not been denied. (App. H)

Petition for Rehearing raised the federal question. (App. I) Petition for Rehearing was denied. (App. J)

REASONS FOR GRANTING THE WRIT

The defense of entrapment relied upon by Defendant Beauchamp in their joint trial for robbery inculpated Co-Defendant SYLVIA so as to require reversal under *Bruton* v. *United States* — S. Ct. —, 20 L. ed. 2d 476.

Numerous Motions for Severance were made before and during the trial by counsel for Defendant SYLVIA; all were denied. Although Defendants BEAUCHAMP and SYLVIA were charged in one information, the charge against Defendant SYLVIA delineated his activities to be sitting in a car for the purpose of aiding Defendant Beauchamp to escape. The robbery for which Defendant SYLVIA was charged as a principal, never took place, although the jury did find that a breaking and entering with intent to commit a felony occurred by Defendant BEAUCHAMP.

No escape took place. Thus, the only facts from which the jury could infer intent on the part of De-

fendant SYLVIA were facts relating to conversation had by Defendant BEAUCHAMP. Almost all of Defendant BEAUCHAMP's conversations relating to the crime were held out of the presence of Defendant SYLVIA, and thus were inadmissible against Defendant SYLVIA. They were admitted along with objects taken as evidence from Defendant BEAUCHAMP, over Defendant SYLVIA's objections.

The foregoing testimony and evidence pertaining to Defendant BEAUCHAMP constituted over half the trial proceedings. Defendant SYLVIA contends that the exclusion of this prejudicial matter in a separate trial would have prevented the State from obtaining a verdict of guilty against him, since the record indicates that there was not sufficient competent evidence to convict Defendant SYLVIA.

In addition to the hearsay evidence offered by the State, prejudicial testimony was offered by Co-Defendant BEAUCHAMP.

Extra-judicial statements of a co-conspirator to be admissible against others must be made in furtherance of the conspiracy charged, if made in their absence. *Krulewitch* v. *United States* (1949) 336 U.S. 440, 93 L. ed. 790, 69 Sup. Ct. 716; *Delli Paoli* v. *United States,* (1957) 352 U.S. 232 1 L. ed. 2d 278, 77 Sup. Ct. 294. This principle is a recognized exception to the hearsay rule.

If the declaration is made in the presence of the co-conspirator, during the pendency of the conspiracy its admissibility is acceptable, for a logical reason. The inference that the defendant who did not make the declaration would naturally have contradicted it if he did not assent to its truth applies. See *Spars* v. *United*

States, (1895) 156 U.S. 51, 39 L. ed. 343, 15 Sup. Ct. 273.

Naturally a statement by a co-defendant, made *in* court, is not subject to the same inference since a defendant has a right not to testify under the Constitution of the United States. This right was exercised by defendant SYLVIA, who presented no testimony. Furthermore, the Defendant is not allowed the right of confrontation when the statement is made in Court, since he cannot compel his co-defendant to take the stand. Defendant BEAUCHAMP's defense of entrapment constituted an admission of the crime charged. *United States* v. *Kaiser,* 138 F.2d 219 (7th Cir. 1944), citing *Sorrells* v. *United States,* 287 U.S. 435, 445, 53 Supp. Ct. 210, 77 L. ed. 413, 86 ALR 249.

Because the defendants were factually joined in the information, which was read to the jury, Defendant SYLVIA could not escape the prejudice of his co-defendant's admission of the crime.

In addition Defendant SYLVIA was subjected to testimony from witnesses called by Defendant BEAUCHAMP on the issue of entrapment.

Defendant SYLVIA was denied the right to have his case presented to the jury at its conclusion, and before additional prejudicial testimony and argument by counsel for Defendant BEAUCHAMP was offered.

Although the Court instructed the jury that some of the testimony and evidence pertained only to Defendant BEAUCHAMP, on several occasions, it refused to repeat the instructions when requested to do so by counsel for Defendant SYLVIA on several other occasions.

In *Bruton* v. *United States*, —S. Ct. —, 20 L. ed. 2d 476, the Court held that the constitutional right of confrontation was denied by failure of a co-conspirator to take the stand regarding incriminatory extra-judicial statements, although the Court gave clear limiting instructions to the jury.

Petitioner respectfully submits that the defense of entrapment relied upon by Defendant BEAUCHAMP constituted an incriminating statement against Defendant SYLVIA, necessarily included within the prohibitions of *Bruton* because Defendant SYLVIA was denied constitutional rights. He was denied his right to confrontation because his co-defendant could not be called to the stand.

Defendant SYLVIA was placed under undue pressure to testify and forced to elect among his constitutional rights in order to remain silent. In view of the extremely limited case against him, the harm to Defendant SYLVIA in the eyes of the jury by his failure to testify or to cross examine his co-defendant constituted deprivation of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Petition for Writ of Certiorari should be granted or in the alternative the decision of the District Court of Appeal of Florida, Third District should be reversed.

Respectfully submitted,

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